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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment Of The Commission's Rules
To Provide Channel Exclusivity To
Qualified Private Paging Systems
At 929-930 MHz

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) PR Docket No. 93-35
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REPLY COMMENTS OF ARCH COMMUNICATIONS GROUP, INC.

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Summary Of The Filing

Arch Communications Group, Inc. shows that the Commission has the authority to grant exclusive use of a channel to a Private Carrier Paging operator. There are substantial distinctions between PCP and Radio Common Carrier operators which will continue to segregate the two, without regard to exclusivity of authorization.

The Commission should adopt its proposal to provide extended construction periods for large integrated PCP systems.

Expansion of grandfathered systems should be strictly limited to *de minimis* extensions, authorized only on the basis of a showing of need.

The Commission should permit limited use of frequency agile transmitters. The use of dual frequency transmitters provides a substantial economy which directly benefits end users by reducing the cost of providing them service.

The Commission should recognize only NABER as the sole frequency coordinator for the PCP channels.

In the event that a licensee fails to construct all facilities authorized under a single call sign, its authorization should remain valid for those facilities which were constructed and should cancel automatically only as to a non-constructed base station.

The criterion proposed by the Commission for the number of transmitters required to earn exclusivity is correct and should be adopted.

No "Achievement" Period should be provided to allow a non-qualified entity to catch up. An entity which is qualified upon adoption of the Commission's Report and Order should be awarded immediate exclusivity.

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REPLY COMMENTS OF ARCH COMMUNICATIONS GROUP, INC.

Arch Communications Group, Inc., through counsel, hereby replies to the comments filed on behalf of the public in the above captioned matter in response to the Commission's Notice of Proposed Rule Making, released March 31, 1993 ("the NPRM"), and states the following:

RCC/PCP Distinctions

Some of the comments received by the Commission allege that the Commission's grant of exclusive use of 900 MHz paging frequencies will destroy the distinctions between common carriage and private carriage.¹ Arch does not agree with that position and supports the Commission's explanation that the grant of exclusive use of Private Radio Service frequencies is within the Commission's authority, without any concurrent modification of the Communications Act of 1934 (as amended) ("The Act"), see, NPRM at footnote 33. Arch operates common carrier paging systems in more than a dozen states and, based on its extensive experience, has no objection, and believes that there is no legally supportable objection, to the

¹ See, e.g., Paging Division of McCaw Cellular Communications, Inc.; Radiophone, Inc.

provision of exclusivity for PCP operators. Specifically, the following is noted for the Commission's consideration:

[REDACTED]

exists no standard within the common carrier rules that failure to construct a single base station might result in cancellation of exclusivity for an entire system.²

Even when the Commission adopts its proposals, private carriers' exclusive authority will be contingent on meeting many standards and maintaining those standards which are not equally imposed on common carriers. Unlike common carriers, private carriers will need to *earn* exclusivity. Common carriers will continue to enjoy exclusivity as a matter of right for each station. That difference is highly significant and should not be ignored in one's analysis of the Commission's authority.

Slow Growth

In an attempt to undermine the Commission's thoughtful efforts to accommodate the burdens of construction of large nationwide or regional systems, some commenters have attempted to add contingencies, standards, obligations, and limitations on operators seeking exclusivity for larger systems.³ It appears that these commenters wish to penalize operators which seek to invest heavily in the provision of private carrier service to the public. Fortunately, the Commission recognized the value to the public of such commitment and sought

² Commenters also conveniently forgot the priority given to common carriers in interconnection agreements, RCCs' ability to resell telephone service at a profit, common carriers' ability to gain exclusivity on multiple channels simultaneously within a single market, and a myriad of other significant differences which would not evaporate with adoption of the Commission's proposals.

³ See, e.g., the comments of Mobile Telecommunications Technologies Corporation, which suggest certification of service to some minimum number of subscribers, strict build out schedules, greater numbers of required markets, and signal coverage standards, id. at 3.

to stimulate substantial investments by providing rational deadlines for completion of construction of large systems.

Arch reiterates that portion of its earlier comments which commend the Commission for proposing rules which reflect the reality that the construction of large, integrated systems, which are designed with the intent of providing valuable paging service to the public in a reliable, efficient manner, require more time than a system which consists of few transmitters clustered in a single market. To deny operators of large systems needed assistance in the form of extended construction periods would be to doom large systems to failure or haphazard construction to meet arbitrary deadlines instead of the needs of the public. Meanwhile, the Commission would inherit an extreme administrative burden to assure rapid construction, process

also looks for failure to construct and process finder's preference claims which would be

suffered from lack of investment, which can be traced directly to uncertainty. Certainly, the imposition of rules which might make impossible the construction of large, integrated systems, would also chill investment as too risky and subject to the whims of suppliers, weather, and the availability of necessary personnel to toss up barely legal systems hastily. There is no rational basis for not allowing greater time for construction of large systems and Arch supports the Commission's recognition of this obvious fact within its proposals.

Expansion Of Existing Systems

A few commenters suggested some method of allowing existing, grandfathered systems to expand, even when such systems would not qualify for earned exclusivity. The question remains, can an existing system expand, even when another carrier has earned exclusivity in the same area? And, if so, how? Arch can conceive of very few methods for allowing non-exclusive operators to expand systems in exclusive areas which would not undermine the Commission's efforts.

A limitation upon expansion of such systems is a natural byproduct of the Commission's proposals. Without such limitations, the Commission's efforts to grant exclusivity would be eroded, one expansion at a time, as exclusive carriers would continue to be placed in a forced sharing position in ever widening areas. Even if the Commission were to limit expansion to only facilities which would be constructed within twenty-five miles of existing, non-exclusive facilities, it requires little imagination to foresee the creation of ribbon systems, cutting across territories, forcing undesirable sharing at each step.

Today, the Commission is seeking to create as many exclusive uses of the frequencies as are possible and equitable on those frequencies so designated. Allowing existing systems, which are operated by entities without either the resources or the commitment to construct integrated systems sufficient to earn exclusivity would be to allow less committed operators to dictate the parameters of the marketplace to the more serious operators. In essence, were the Commission to permit grandfathered systems to expand, it might allow the licensee of a single base station to dictate frequency sharing terms to an operator of hundreds of cochannel facilities. Although Arch strongly supports equity among operators, the public interest would not be served by placing larger operators under the control (and possible onerous demands) of smaller speculators. Arch urges the Commission to freeze all expansion of non-exclusive systems once exclusivity on a channel has been.⁵

Arch does not believe that a freeze on expansion of a grandfathered system should bar modification of an existing system which does not increase the non-exclusive operator's service area beyond a *de minimis* amount. Arch fully recognizes the vagaries of business, including, for example, the limited term of a site lease, which can compel the modification of an existing system. Arch does not seek to bar existing, non-exclusive operators from making rational business decisions in reaction to unexpected occurrences. Arch suggests, however, that non-

⁵ Arch believes that Industrial Telecommunications Association, Inc., was in error in suggesting that the scope of a nationwide exclusive licensee's authority should be limited by allowing other persons to file for the frequency in allegedly unused areas, ITA comments at 6. The tremendous investment which a nationwide licensee will be required to make to earn exclusivity entitles that operator to unfettered use of the channel, without fear that the value and

exclusive systems not be allowed, under any circumstances, to expand into areas which are protected by the existence of an exclusive operator's facility, or for which an exclusive operator has applied and received grant of a license to operate an exclusive facility. Arch, therefore, suggests the following criteria for grant of an application for modification of a license for a non-exclusive system which is located within an area where another licensee has earned and been awarded exclusivity:

- * Such modification shall not include the addition of base stations, unless such addition shall not increase the applicant's service area by greater than five percent, assuming a service area twenty-miles in radius for each licensed facility.
- * Such modification shall not cause a base station to be placed within a 70-mile radius of any cochannel base station authorized to an exclusive licensee.
- * Such modification shall be based on a showing of need by the applicant, fully demonstrating that such proposed modification is not intended to increase the applicant's service area and that such proposed modification is reasonable and necessary.

Frequency Agile Transmitters

Arch supports those commenters which seek to employ frequency agile equipment for the provision of service on more than one frequency and reiterates its suggestion that operators be allowed to seek and hold exclusive authority for up to two frequencies simultaneously.⁶ As the comments have shown, two frequency operation is necessary, prudent, and conforms to the actual operations of serious investors in private carriage. Economic and competitive realities compel operators to employ a single transmitter for operation of dual frequency systems. The Commission's rules should not encourage duplication of cost, effort, resources, and investment

⁶ See, comments of Pagemart, Inc. and Message Center Beepers, Inc.

to accomplish the laudable goal of providing the public with service flexibility from a single operator. Nor should the Commission's rules unknowingly place undue burdens on operators which will result in higher costs for end users.

To place a bar on the efficiencies to be gained by the use of frequency agile equipment would not serve the public interest in obtaining the greatest level of service offerings at the lowest cost. Instead, such a bar would serve only those persons who seek to create greater

requested that only NABER coordinate these applications and provide the necessary assurances that its representative capacity can offer.

Failure To Construct

Some commenters suggest that, in the event that an exclusive operator fails fully to construct its system, its license should be cancelled, including its authority to operate all constructed facilities which also appear on the authorization. This suggestion is improper and unfairly burdens those operators who have made a good faith effort toward construction but were unable to complete the process within the allotted construction period. Certainly, the Commission would not wish to promote the economic waste that would be attendant to such a scheme. For example, an operator which constructed five transmitters but was unable to complete the sixth in a timely manner should not be placed at risk of having to deconstruct five fully operational transmitters to satisfy a mechanical application of the Commission's rules. Such a policy would create havoc in the marketplace -- first, to the operator which must discontinue operation of its system and second, to the end users receiving service from the constructed facilities.

Arch believes that the risk of losing exclusivity for a period of one year is sufficient to urge prompt construction. Since the objective of this rule making proceeding is to provide a manner for achieving earned exclusivity (or conversely to remove same from the unentitled), the Commission's focus should be on this central theme, rejecting suggestions which demand higher punitive awards from operators which have attempted in good faith, but failed, to earn the prize of exclusivity.

Additionally Suggested Criteria

No matter what criteria or benchmarks are adopted for earned exclusivity, there will be those who believe that a better method has been rejected. Arch supports the Commission's proposed criteria for establishment of exclusive use. Suggestions regarding use of Metropolitan Trade Areas, MSAs and the like, would merely muddy the waters and cause confusion. Since the proposed criteria are fully workable and simplified, Arch supports the Commission's proposals.

In the same vein, Arch supports and urges adoption of the Commission's criteria for the number of facilities necessary to qualify for exclusivity, including the criterion of eighteen transmitters for the top three U.S. markets. This number should be sufficient to demonstrate an operator's sincerity and its ability to provide service to the market, without demanding that operators construct "gold plated" systems. The Commission's efforts should be directed at the minimum necessary standards for grant of exclusivity. The Commission would be required to intrude into an operator's valid business choices if such standards extend to a requirement that systems must be something more than the minimum necessary to provide a comprehensive service offering to the public. Eighteen transmitters, properly positioned so as to qualify as an integrated system, are sufficient to meet this requirement.

"Achievement" Periods

Oddly, Metagram America, Inc. requested that the Commission adopt an "Achievement Period" to accommodate entities which are operating existing systems but which do not qualify for exclusivity. Arch cannot discern the purpose or intent of Metagram America, Inc.'s request,

which appears directed at serving the commenter's private needs, but does not appear to be useful for the purpose of adopting rules for the industry.⁷ Obviously, such problems as Metagram America, Inc. might be experiencing are a matter appropriate to a request for a waiver of the Commission's rules, as adopted, and not a proper basis for rule making.

The suggested Achievement Period would severely undermine the Commission's good faith efforts and would make administration of the adopted rules extremely difficult as existing operators would claim that 70%, then 30%, then 20% of the construction required to earn exclusivity should entitle to some kind of a right, as against a fully qualified exclusive licensee. Metagram's comments then request that the Commission add a year of further uncertainty to the process of determining whether affected operators will, in fact, complete construction. Metagram asks too much of the Commission, particularly in view of the Commission's generous proposals which provide protection during an already ample construction period.

For these reasons, Arch suggests that Achievement Periods be summarily rejected as an undue administrative burden on the Commission and a disruptive diversion from the rule making process, without any concurrent benefit to any entity other than, possibly, Metagram America, Inc.

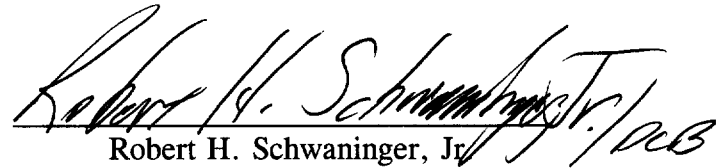
⁷ It appears that Metagram America, Inc.'s comments are directed moveover toward progressing pending, short-term private litigation than toward assisting the Commission in creation of long-lived rules.

Conclusion

Arch respectfully requests that the Commission adopt rules in this proceeding consistent with Arch's initial comments and the instant reply comments for those reasons demonstrated therein.

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By


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Dated: May 20, 1993

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I, Gregory Lessard, do hereby certify on this 20th day of May, 1993, that I have caused a copy of the foregoing Comments to be served, via United States mail, postage prepaid to each of the following persons.

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